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September 15, 2022

BY ECF

The Honorable Edgardo Ramos
United States District Court
Southern District of New York
40 Foley Square
New York, New York 10007

Re: *United States v. Trevor Milton, S1 21 Cr. 478 (ER)*

Dear Judge Ramos:

We write in opposition to the Government's letter requesting the admission of certain text messages and emails sent by Nikola employees about their work at Nikola. (ECF 173). For the reasons discussed below and in Defendant's Memorandum of Law in Opposition to the Government's Motions *In Limine* (ECF 146 at 31-33), the Court should deny the Government's request because these messages are inadmissible hearsay and do not qualify for any of the hearsay exclusions in Federal Rule of Evidence 801(d)(2)(D) or otherwise.

First, the messages are inadmissible under Federal Rule of Evidence 801(d)(2)(D). The Government is wrong that Mr. Milton was the employees' ultimate supervisor. He was chairman of Nikola's board of directors, not part of Nikola's management. As chairman, Mr. Milton had no agency or employment relationship with the witnesses at issue, and the matters they discussed in their personal messages were not within the scope of any agency or employment relationship with him. (See ECF 146 at 31-33).

Second, Mr. Mukasey's opening statement has not called into question the credibility of a specific witness. And the Government's attempt to admit the text and email messages at issue

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without any attack on any specific witness’s credibility is without support in the cases cited by the Government. *See, e.g., United States v. Flores*, 945 F.3d 687, 705 (2d Cir. 2019) (finding no error in admitting prior consistent statements when the defendant challenged the credibility of a specific witness). The Court should decline the Government’s request to extend the *Flores* decision.

Third, the messages are not admissible under Rule 803(3). Whether private texts between employees show that any employee believed that Mr. Milton went too far or crossed a line, the Government does not claim that these employees ever told Mr. Milton that such was the case—and Mr. Milton’s state of mind is key. Moreover, the Court should deny the Government’s request to admit the messages under Federal Rule of Evidence 403 because the probative value of the messages is substantially outweighed by the danger that they will unfairly prejudice Mr. Milton and mislead the jury. This is especially so given the water cooler nature of personal texts and emails where employees are likely to be letting off steam about their work.

Fourth, the messages are not admissible business records under Federal Rule of Evidence 803(6) because they are not kept in the course of a regularly conducted activity of the business and creating the messages was not a regular business practice. *See, e.g., United States v. Weigand*, No. 20-CR-188 (JSR), 2021 WL 568173, at *2 (S.D.N.Y. Feb. 14, 2021) (“Rule 803(6) only applies to a record when making the record was a regular practice of that [regularly conducted business] activity. . . .) (internal quotation marks omitted) (alteration in original). Rather, the messages are personal messages from the employees’ personal cell phones containing their personal views and sent at irregular intervals. They were not made in furtherance of the employer’s needs and the employees were under no obligation to create them. *See New World Trading Co. v. 2 Feet Prods., Inc.*, No. 11 CIV. 6219 SAS, 2014 WL 988475, at *1 (S.D.N.Y. Mar. 13, 2014) (although “an email could conceivably qualify as a business record . . . most of the emails here contain unique and sporadic communications, not created as a record of any ‘regularly conducted business activity.’ They, therefore, fall outside the exception.”); *see also Park W. Radiology v. CareCore Nat. LLC*, 675 F. Supp. 2d 314, 333 (S.D.N.Y. 2009) (finding that business records exception did not apply to company emails that “employees were not under an obligation to create . . . as a record of regularly conducted business activity”).

The Court should deny the Government’s request to admit certain text messages and emails sent by Nikola employees about their work at Nikola.

Respectfully submitted,

/s/ Bradley J. Bondi
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